

Minutes

D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING

Tuesday, December 18, 2018

Location: 955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor (OEA Board Chair), Vera Abbott (OEA Board Member), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Wynter Clarke (OEA Paralegal), Theresa Romanosky (Member of the Public), and Frances Wade (Member of the Public).

- I. **Call to Order** – Clarence Labor called the meeting to order at 11:01 a.m.
- II. **Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. **Adoption of Agenda** –Peter Rosenstein moved to adopt the Agenda. Jelani Freeman seconded the motion. The Agenda was adopted by the Board.
- IV. **Minutes from Previous Meeting** – The September 4, 2018 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. **New Business**
 - A. **Public Comments on Petitions for Review**
 1. There were no comments offered.
 - B. **Summary of Cases**
 1. **Chantel Harris v. Department of Youth Rehabilitation Services, OEA Matter No. J-0017-18** – Employee worked as a Management Liaison Specialist with the Department of Youth Rehabilitation Services. On November 7, 2017, Employee received a notice that she would be terminated from Agency. According to Agency, Employee was removed from her position during her probationary period pursuant to Chapter 8, § 814 of the D.C. Personnel Regulations. The effective date of Employee's removal was November 24, 2017.

Employee filed a Petition for Appeal with the Office of Employee Appeals on December 1, 2017. She argued that according to DPR § 813.8, she was in a Career Permanent status, not a probationary status, at the time of termination because she completed her probationary period at another District agency prior to working at Agency. Accordingly, Employee requested that she be reinstated to her position and made whole.

On January 2, 2018, the OEA Administrative Judge issued an order directing Employee to brief whether her appeal should be dismissed for lack of jurisdiction because she was in a probationary status at the time of her appeal. In response, Employee asserted that she was a permanent, non-probationary Career Service employee who was improperly treated as a probationary employee. It was Employee's position that because she did not have a break in service, it was unlawful for Agency to require her to serve a second probationary period. Consequently,

Employee opined that she could only have been removed for cause, as provided in Chapter 16 of the DPR.

In response, Agency acknowledged that Employee completed a probationary period with another District agency; however, it explained that the director of the Office of Human Resources determined that it was necessary to engage Employee on a probationary basis as the duties and responsibilities of the new position differed significantly from those of her prior position. It provided that pursuant to Chapter 8 of the DPR, an employee who is terminated from their position prior to their one-year anniversary in the position, does not have appeal rights. Accordingly, Agency requested that Employee's appeal be dismissed for lack of jurisdiction.

On March 9, 2018, the AJ issued his Initial Decision. He agreed with Agency and held that although both positions were within the Human Resources field, the Management Liaison Specialist position required additional duties and a higher level of complexities than the Human Resources Generalist position. Thus, the AJ reasoned that Employee's position with Agency was within a different line of work as provided in DPR § 813.9. Moreover, the AJ found that Agency made clear in its offer letter to Employee that her appointment would be probational. Thus, he held that the matter was required to be dismissed for lack of jurisdiction because a termination during a probation period is not appealable or grievable to OEA.

Employee filed her Petition for Review on April 4, 2018. She argues that the AJ's decision was not supported by substantial evidence because he improperly relied only on the position descriptions submitted by Agency, without affording her the opportunity to present evidence or testimony of her actual job duties and responsibilities. Additionally, she argues that the AJ's determination that positions with additional duties and more complexity is not enough to establish that positions are within a different line of work. Accordingly, Employee requests that the Board grant her Petition for Review.

On May 9, 2018, Agency filed its Reply to Employee's Petition for Review. It argues that the AJ correctly determined that OEA does not have jurisdiction over probationary employees. Furthermore, Agency maintains that it was in its right to require Employee to complete another probationary period upon hire. Finally, Agency opines that the AJ's legal conclusion of the meaning of a different line of work was accurate. Therefore, it requests that Employee's Petition for Review be denied

2. **Gennifer Cunningham v. D.C. Public Schools, OEA Matter No. 2401-0058-17-** Employee worked as an Administrative Aide with the D.C. Public Schools. On May 22, 2017, Agency issued a notice to Employee informing her that she was being separated from her position pursuant to a Reduction-in-Force. The effective date of the RIF was August 4, 2017. Employee contested the RIF action and filed a Petition for Appeal with the Office of Employee Appeals on June 16, 2017.

Agency filed its Answer to Employee's Petition for Appeal on July 19, 2017. It asserted that the RIF was conducted pursuant D.C. Official Code § 1-624.02. According to Agency, Employee was afforded one round of lateral competition where she received the fifth lowest score in her competitive level. It also asserted that it provided Employee with more than the required thirty days' notice that her position was being eliminated. Therefore, it believed that its RIF action was proper.

The OEA Administrative Judge ordered the parties to submit legal briefs addressing whether Agency followed the District's laws when it conducted the RIF. Agency asserted that it had the authority to determine if the RIF was necessary. It explained that Wilson Senior High School was the competitive area, and the Administrative Aides were the competitive level. Agency contended that Employee received the fifth lowest score after conducting one round of lateral competition among the six Administrative Aides. Therefore, it contended that it properly conducted the RIF, and Employee's separation from service was appropriate.

In response, Employee argued that Agency failed to meet its burden to establish that the RIF was conducted in accordance with the governing regulations and statutes. It was Employee's position that Agency misstated the number of Administrative Aides, and it combined different job titles and positions into the competitive level. Moreover, she argued that her assessment scores were manipulated, and Agency failed to explain how the scores she received were in accordance with the RIF regulations.

On June 5, 2018, the AJ issued her Initial Decision. She determined that Agency did not properly comply with District Personnel Regulations § 2406. The AJ held that because Agency failed to provide evidence of the Administrative Order from the Mayor, there was no proof that the RIF was approved. As a result, she concluded that Agency did not meet its burden of proof in this matter. Consequently, she reversed Agency's RIF action; ordered that Agency reinstate Employee to her last position or a comparable position; and ordered Agency to reimburse Employee with all back pay and benefits lost as a result of her separation.

Agency filed a Petition for Review on June 11, 2018. It contends that it is not required to seek approval from the Mayor prior to conducting the RIF. Agency argues that pursuant to Mayor's Order 2007-158, Mayor Fenty delegated his authority to the Chancellor to function as the personnel authority for Agency. Accordingly, it requests that Employee's appeal be dismissed and that the Board affirm that Agency is not required to issue an Administrative Order before conducting the RIF.

3. **Jessica Dillon v. D.C. Board of Ethics and Government Accountability, OEA Matter No. J-0030-18** – Employee worked as a Program Analyst with the D.C. Board of Ethics and Accountability. On January 1, 2018, Agency informed Employee that she was being terminated effective Monday January 8, 2018. On February 7, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals. An Administrative Judge was assigned to the matter in February of 2018.

On March 14, 2018, the AJ issued an order requiring Employee to address the issue of jurisdiction because Agency's answer asserted that Employee was in a probationary status at the time of her termination. On July 12, 2018, the AJ issued an Initial Decision, finding that OEA could exercise jurisdiction over Employee's appeal because she was no longer in a probationary status at time of her termination. Additionally, the AJ concluded that Agency failed to follow the appropriate District of Columbia regulations in administering the instant adverse action. Consequently, Agency's termination action was reversed; it was ordered to reinstate Employee with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on August 16, 2018. On October 5, 2018, Employee filed a Motion to

Dismiss, stating that her appeal was settled pursuant to the parties' executed Agreement and Release. The motion further requested that Employee's appeal be dismissed with prejudice. Similarly, on October 16, 2018, Agency filed a Notice of Withdrawal of Petition for Review. The notice reiterates that the parties have settled the matter and requests that Agency's petition be dismissed as moot.

4. **Cheryl Span v. D.C. Child and Family Services, OEA Matter No. 1601-0041-16** – Employee worked as a Program Monitor with D.C. Child and Family Services. On January 20, 2016, Employee received a Notice of Proposed Removal, charging her with “any on-duty employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty.” Agency identified two specifications in support of its neglect of duty charge: failure to complete a 100 % desk audit of a private provider, Umbrella Therapeutic Services; and failure to submit an accurate and complete quarterly report for Umbrella Therapeutic Services. On March 4, 2016, Employee received a Notice of Final Decision on Proposed Removal, sustaining the neglect of duty charge. The effective date of her termination was March 4, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals on April 4, 2016, disagreeing with each of Agency's assessments concerning her duties and responsibilities. In response, Agency argued that its termination action was supported by substantial evidence; that it did not commit a harmful procedural error; and that Employee was terminated in accordance with all applicable laws, rules, and regulations. Therefore, it opined that the adverse action was supported by cause, and that termination was the appropriate penalty under the circumstances.

An Initial Decision was issued on June 29, 2018. With respect to the neglect of duty charge, the AJ held that Employee failed to complete a 100% desk audit for the entire staff at Umbrella before October 30, 2015. The AJ also reasoned that Employee neglected her duties by utilizing the incorrect form to prepare a written transfer summary to another Program Monitor; failing to obtain the required clearance documentation from Umbrella during a site visit on October 28, 2015; and failing to adequately follow up with Umbrella regarding one of its employee's expired security clearances.

Next, the AJ held that Employee neglected her duties by failing to submit an accurate Fourth Quarter Report for Fiscal Year 2015. He noted that Employee's report was edited by her supervisor on at least four separate occasions because of errors, omissions, and lack of detail. Concerning the penalty, the AJ stated that the Table of Appropriate Penalties, found in Chapter 16 of the District Personnel Manual, was applicable to the instant matter. After reviewing the record, the AJ determined that the current matter constituted the fifth instance in which Employee was charged and disciplined for neglect of duty. Based on the foregoing, the AJ concluded that Agency's adverse action was taken for cause, and that removal was an appropriate penalty under the circumstances.

Employee disagreed with the AJ's findings and filed a Petition for Review with OEA's Board. She argues that Agency failed to produce substantial evidence to support its assertions regarding the neglect of duty charge. Employee also states that Agency attempted to raise new allegations regarding her work performance that lacked credibility. Additionally, she asserts that Agency utilized her Family Medical Leave Act status as a pretense to discipline her. Employee claims that Agency penalized her for refusing to accept an offer of settlement after filing an appeal with

OEA. Lastly, Employee contends that Agency improperly benefited from the District of Columbia Attorney General's refusal to appoint an independent counsel to prosecute alleged violations of the Rehabilitation Act of 1973 and Title VII of the Civil Rights Act of 1964. Therefore, she requests that this Board grant her Petition for Review and reverse the Initial Decision.

In response, Agency argues that Employee fails to substantiate any of the claims raised on Petition for Review and that it met its burden of proof with respect to the neglect of duty charge. Moreover, Agency states that it presented a number of witnesses who provided relevant testimony to support its position that Employee's termination was warranted. As a result, it posits that the AJ's decisions were based on substantial evidence. Consequently, Agency asks that the Board uphold the Initial Decision and deny Employee's Petition for Review.

5. **Frances Wade v. Department of Behavioral Health, OEA Matter No. 1601-0025-17** – Employee worked as a Consumer Affairs Liaison with the Department of Behavioral Health. On March 4, 2015, Employee was served with a fifteen-day Advance Notice of Proposed Removal based on charges of neglect of duty; unauthorized absence; failure to follow procedures for leave request and approval; and absence without official leave. The charges stemmed from Employee's failure to report for full duty after being medically cleared from an on-the-job injury that she sustained on May 24, 2013. On March 31, 2015, Agency issued its Notice of Final Decision, sustaining the charges against Employee. The effective date of her termination was April 7, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals on April 29, 2015. In her appeal, Employee stated that she should not have been ordered to return to her position because of her physical injuries and supporting medical reports. In its Answer to Employee's Petition for Appeal, Agency argued that its termination action was supported by a preponderance of the evidence and that Employee's termination was an appropriate exercise of managerial discretion. As a result, it requested that OEA uphold Employee's termination.

An OEA Administrative Judge was assigned to this matter in September of 2015. On November 16, 2016 the AJ held a status conference to assess the parties' arguments. The AJ subsequently ordered Employee and Agency to submit briefs. After reviewing the parties' submissions, the AJ determined that an evidentiary hearing was warranted because there were genuine issues of material fact that could not be decided on the record alone. Therefore, a hearing was scheduled for October 30, 2017. On the day of the hearing, the parties informed the AJ that no witnesses were present to provide testimony. As a result, Employee and Agency entered exhibits and oral stipulations into the record, followed by written closing statements.

An Initial Decision was issued on February 27, 2018. With respect to the AWOL charge, the AJ highlighted three of Employee's Verification of Treatment forms from her treating physician, Dr. Faheem Moghal, which advised that she could not return to work because of her Post Traumatic Stress Disorder diagnosis. The AJ noted that while the forms were completed outside of the relevant timeframe of February 9, 2015 through February 27, 2015, the documents nonetheless provided insight into Employee's ongoing illness.

Moreover, the AJ found that Agency "utterly" failed to meet its burden to produce any witnesses at the evidentiary hearing in support of its position that Employee was

AWOL. As a result, the AJ concluded that Employee's medical condition was sufficiently debilitating and continuous as to provide her with a legitimate excuse for being absent from work without leave during the relevant time period.

Additionally, the AJ noted that District Personnel Manual § 1268.2 and § 1268.4 collectively provide that an AWOL charge may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay if it is later determined that an employee was ill or that the absence was excusable. However, she provided that Agency erroneously failed to amend the AWOL charge after it was informed of Employee's excusable illness.

With respect to the neglect of duty charge, the AJ held that because Employee's absence from February 9, 2015 until February 27, 2015 was excusable, Agency was prevented from charging her with neglect of duty. Consequently, she concluded that Agency failed to meet its burden of proof for each charge levied against Employee. Therefore, she reversed the termination action and ordered Agency to reinstate Employee to her previous position of record with back pay and benefits.

Agency disagreed with the Initial Decision and filed a Petition for Review on April 3, 2018. It argues that OEA's Board has previously held that an employee's admission is sufficient to meet an agency's burden of proof with respect to a charge of AWOL. It further asserts that Dr. Moghal's VOT forms lacked clarity and were inconclusive regarding the relevant AWOL period. Regarding Employee's medical condition, Agency asserts that Dr. Moghal's diagnosis of PTSD is not supported by any documentation that explains why Employee could not perform the functions of her position. As a result, it opines that the Initial Decision is not supported by substantial evidence and requests that the Board grant its Petition for Review.

In response, Employee contends that the AJ correctly concluded that Agency carried the burden of proof in this case. Employee states that she never admitted to being AWOL from February 9, 2015 to February 27, 2015; thus, the burden of proof remained with Agency to prove each charge by a preponderance of the evidence. Additionally, Employee maintains that she provided a legitimate medical excuse for being absent from work. She further states that Agency was provided with sufficient documentation of her PTSD diagnosis. Lastly, Employee provides that she did not neglect her duties because her absences were excused under District law. Consequently, she believes that termination was an improper and asks that the Initial Decision be upheld.

C. Deliberations – After the summaries were provided, Vera Abbott moved that the meeting be closed for deliberations. Patricia Hobson Wilson seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor stated that, in accordance with D.C. Official Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

E. Final Votes – Clarence Labor provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Chantel Harris v. Department of Youth Rehabilitation Services

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor			X	
Vera Abbott			X	
Patricia Hobson Wilson			X	
Jelani Freeman			X	
Peter Rosenstein			X	

Five Board Members voted in favor of remanding the matter to the Administrative Judge for further findings. Therefore, the matter was remanded.

2. Gennifer Cunningham v. D.C. Public Schools

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor		X		
Vera Abbott		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		

Five Board Members voted in favor of denying Agency's Petition for Review. Therefore, the petition was denied.

3. Jessica Dillon v. D.C. Board of Ethics and Government Accountability

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor				X
Vera Abbott				X
Patricia Hobson Wilson				X
Jelani Freeman				X
Peter Rosenstein				X

Five Board Members voted in favor of dismissing Agency's Petition for Review. Therefore, the petition was dismissed.

4. Cheryl Spann v. D.C. Child and Family Services

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor		X		
Vera Abbott		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		

Five Board Members voted in favor of denying Agency's Petition for Review. Therefore, the petition was dismissed.

5. Frances Wade v. Department of Behavioral Health

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor	X		X	
Vera Abbott	X		X	
Patricia Hobson Wilson	X		X	
Jelani Freeman	X		X	
Peter Rosenstein	X		X	

Five Board Members voted in favor of granting Agency’s Petition for Review. Therefore, the petition was granted and the matter was remanded to the Administrative Judge.

- F. Public Comments** – There were no public comments offered.
- VI. Adjournment** – Peter Rosenstein moved that the meeting be adjourned; Jelani Freeman seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor adjourned the meeting at 12:00 p.m.

**Respectfully Submitted,
Wynter Clarke
Paralegal Specialist**